JUDGMENT OF THE TRIAL COURT

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

(Caption — Civil Action No. 2738)
(Filed June 2, 1962)

BE IT REMEMBERED that on the 21st day of March, 1962, came on to be heard the above entitled and numbered cause and came the parties by and through their attorneys of record and announced ready for trial; whereupon a jury was duly empaneled and selected and after the parties proceeded to adduce their evidence from day to day, the parties all announced that they had rested their case and the cause, as between the plaintiff and defendant, was thereupon submitted to the jury on special interrogatories, in accordance with the Federal Rules of Civil Procedure.

The jury having retired to deliberate, thereafter returned with its verdict and answered that the plaintiff has sustained an injury to his back as a result of a dunnage board's breaking on defendant's vessel, but further found, in response to interrogatory No. 2, that the dunnage board in question was unseaworthy.

After the Court further noting that at the close of the evidence, plaintiff's counsel specifically announced to the court that he waived any contention of negligence in his suit, and further announced to the Court that he was not making any contention of unseaworthiness of the vessel in any particular, other than the dunnage board which broke at the time of plaintiff's accident, and was making no claim of unseaworthiness, because of the method in which the cargo aboard the vessel was stowed.

Accordingly, it appearing to the Court that the jury has expressly found that the dunnage board which broke was unseaworthy, and that plaintiff had waived all other basis for liability, whether by negligence or unseaworthiness, and that the defendant is, therefore, entitled to a judgment that the plaintiff take nothing, it is, accordingly,

ORDERED, ADJUDGED AND DECREED that plaintiff, William Jefferson, take nothing against the defendant, Taiyo Kaium K.K., by reason of this suit, and it is, further,

ORDERED, ADJUDGED AND DECREED that the third-party action by the defendant, Taiyo Kaium K.K. against the third-party defendant, Suderman Stevedores, Inc., is rendered moot by reason of the entry of this judgment, the said third-party action is, therefore, dismissed without prejudice; and it is, further,

ORDERED, ADJUDGED AND DECREED that all costs of Court are taxed against the plaintiff, for which let execution issue in the event the same are not seasonably paid.

ENTERED AT Houston, Texas, this 30 day of May, 1962.

s James Noel
PRESIDING JUDGE

S Frank G. Harmon

Approved as to form:

s/ Mandell & Wright
By H. Wright

Approved as to form:

s/ Royston, Rayzor & Cook
By Bryan F. Williams

OPINION OF COURT OF APPEALS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19971

WILLIAM H. JEFFERSON,

Appellant,

versus

TAIYO KATU'N, K. K. et al.,

Appellees.

Appeal from the United States District Court for the Southern District of Texas.

(November 28, 1962)

Before HUTCHESON, CAMERON and JONES, Circuit Judges.

JONES, Circuit Judge: The appellant brought an action against the owner of a steamship for damages claimed as a result of an injury he had received while working as a stevedore in the loading of the vessel. Suit was brought on the dual theory of negligence of the owner's employees and the unseaworthiness of the vessel. At the trial the claim of

negligence was abandoned. The appellant requested and the court refused to give an instruction that the vessel was unseaworthy as a matter of law. At the time of the injury the appellant was stowing cotton in one of the holds of the vessel and, with others of the crew, was walking upon dunnage laid upon barrels which constituted a part of the cargo. The district court propounded to the jury the question as to whether the appellant was injured by the breaking of a dunnage board, and the jury gave an affirmative answer. The next question put to the jury was whether the dunnage board was unseaworthy at the time of the appellant's accident. The jury answered that "it was seaworthy." Judgment was entered for the owner of the vessel on the special verdict of the jury and from that judgment this appeal has been taken.

The sole question for us to determine is whether, as a matter of law, the vessel was unseaworthy and the appellant was entitled to an instructed verdict on liability. It will be a rare case where the issue of unseaworthiness as the proximate cause of an injury is to be resolved for or against a shipowner as a matter of law. Norris, Maritime Personal Injuries, 106-107, § 43. This is not such a case; and we do not think there would be any addition made to the jurisprudence in the field by a recital of the evidence. The Supreme Court, in discussing the setting aside of jury verdicts in cases involving the seaworthiness of a vessel by appellate courts, has said:

> "We might agree with the Court of Appeals had the question of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall otherwise be re-examined in any court of the United States, than according to the rules

of the common law.'" *Atlantic & Gulf Stevedores* v. *Ellerman Lines*, 369 U. S. 355, 82 S. Ct. ...., 7 L. Ed. 2d 798.

The answers to the two interrogatories previously mentioned are not, on the record before us, inconsistent. The finding that the appellant's injury resulted from the breaking of a dunnage board does not require a finding that the vessel was unseaworthy. In the opinion from which we have quoted it is also said:

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search of one possible view of the case which will make the jury's findings inconsistent results in a collision with the Seventh Amendment." *Atlantic & Gulf Stevedores* v. *Ellerman Lines*, supra.

We find no merit in the contention urged by the appellant. The judgment of the district court is

AFFIRMED.

MOTION FOR DIRECTED VERDICT

MR. WRIGHT: I had waited until after the jury left because I wanted to make a motion that the court instruct the jury, as a matter of law, that this vessel was unseaworthy. At least this area was unseaworthy. It seems to me that the doctrine of unseaworthiness is that one of two things must be true: Either the board was insufficient under the circumstances, or it was defective under the circumstances. Either one of which means that under the doctrine of absolute liability, liability exists. There is no other way that you can account for the board breaking except that it was either insufficient for the purpose, or it was defective for the purpose. Otherwise it would not have broken.

I therefore move the court to instruct the jury that they find liability as a matter of law.

MOTION FOR JUDGMENT N.O.V.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

(Caption — Civil Action No. 2738)
(Filed April 5, 1962)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW WILLIAM H. JEFFERSON, Plaintiff in the above styled and numbered cause, and moves the Court to disregard the jury's finding in Question No. 2 as being contrary to the law and the evidence and to then enter a partial judgment herein on the remaining jury verdict fixing liability herein against the Defendant, Taiyo Kaiun K.K.; or, in the alternative, to enter a partial judgment herein fixing liability against the Defendant, Taiyo Kaiun K.K., notwithstanding the jury's finding in Question No. 2, such finding being contrary to the law and the evidence; and in either event granting Plaintiff a new trial on the issue of damages, and for such motion would respectfully show the Court as follows:

1.

In Question No. 1, the jury found Plaintiff suffered an injury on February 1, 1959, as a result of a dunnage board breaking.

a. A finding that the dunnage board broke is a finding that the board, being unquestionably used as was intended, was unseaworthy under the facts as proved.

b. The jury's answer is a clear finding of an injury.

c. A finding that Plaintiff was injured "as a result" of the dunnage board breaking is a finding that the breaking of the dunnage was a proximate cause or contributed to Plaintiff's accident.

Therefore, the jury's answer to Question Number 1 finds all the necessary elements to place liability on the Defendant Taiyo Kaiun K.K.

2.

Question Number 2 should not have been submitted to the jury, and Plaintiff timely objected to its submission.

a. There is no evidence to support the jury's answer thereto.

b. As a matter of law, the dunnage board that broke, under the circumstances of this case, was unseaworthy.

c. All of the evidence, without exception, shows:

(1) The dunnage board was intended to be walked on and worked on in loading cotton;

(2) Cotton was being loaded in the usual and ordinary way;

(3) The dunnage board was not reasonably suited for this usual and ordinary use to which it was being put, especially in view of the excessively large open area between the drums, which the dunnage board spanned or covered.

3.

Considering the jury's answer to Question No. 1, the evidence is undisputed that, and as a matter of law, the breaking of the dunnage board was a proximate cause or contributed to Plaintiff's injury on February 1, 1959.

WHEREFORE, Plaintiff prays that judgment be entered herein fixing the liability of the Defendant, Taiyo Kiaun K.K., to the Plaintiff for damages, the amount thereof to be determined on a new trial, based on the verdict of the jury, disregarding the jury's answer to Question No. 2, or, alternatively, based on the finding of the jury in Question No. 1, and notwithstanding the answer of the jury to Question No. 2, and for such other and further relief to which Plaintiff may show himself entitled in the premises.

MANDELL & WRIGHT

By H. Wright
Attorneys for Plaintiff

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POINT OF ERROR IN COURT OF APPEALS:

An appliance of a vessel which does not hold up under ordinary and customary use is unseaworthy as a matter of law. The Trial Court therefore erred in failing to enter judgment on the question of liability in favor of Plaintiff and against the Defendant.